RECORD AND BRIEFS

No. 15-513

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In The

Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, ex rel.
CORI RIGSBY, KERRI RIGSBY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and the civil justice system; improving the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are exceptionally important to civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

The issue in this case—the standard for requiring dismissal of a *qui tam* suit for violation of the False Claims Act's mandatory seal requirement, 31 U.S.C. § 3730(b)(2)—implicates the integrity and fairness of the statute's private enforcement scheme, under which "civil *qui tam* actions are filed by

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. Petitioner's and Respondents' counsel have lodged with the Clerk letters consenting to the submission of *amicus* briefs.

private parties, called relators, 'in the name of the Government.'" *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1973 (2015) (quoting 31 U.S.C. § 3730(b)(1)). Ensuring that relators and their counsel adhere to congressionally mandated procedures—including the statutory requirement that a *qui tam* "complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders," 31 U.S.C. § 3730(b)(2)— is critical to the operation of the False Claims Act's *qui tam* provisions and achievement of its goals.

The seal requirement "is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine . . . whether it is in the Government's interest to intervene and take over the civil action." S. Rep. No. 345, 99th Cong. 2nd Sess. 1986 ("Senate Report"), 1986 U.S.C.A.A.N. 5266, 5289. At the same time, the seal provision "allows the *qui tam* relator to both start the judicial wheels in motion and protect his own litigative rights." *Ibid.* In addition, it has the critical and laudable effect of "protect[ing] the defendant's reputation from unfounded public accusations." *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 293 n.4 (6th Cir. 2010). "Congress was well aware of the various policy interests that might be affected by an *in camera* requirement" and decided how to "balance those factors." *Id.* at 296-97.

Strict compliance with the seal requirement, and the Justice Department's *in camera* review of *qui tam*

complaints, are particularly important in view of the continuing proliferation of *qui tam* suits against government contractors, health care providers, insurance companies, federal-grant recipients, and other entities that submit claims for federal payments or reimbursements. *See generally* United States Department of Justice ("DOJ"), Civil Division, Fraud Statistics Overview (Oct. 1, 1987 – Sept. 30, 2015), http://tinyurl.com/zya84bv (year-by-year summary of number of new *qui tam* suits, *qui tam* settlement and judgment amounts, and *qui tam* relator share awards).

Lured by the chance to pocket a substantial, statutorily authorized share of settlement proceeds without having to prove in court that a defendant knowingly submitted false or fraudulent claims to the Government, *see* 31 U.S.C. §§ 3730(d)(1) & (2), opportunistic relators and/or bounty-hunter counsel have every incentive for pressuring *qui tam* defendants into settling rather than defending against even unwarranted False Claims Act allegations. When a *qui tam* suit is publicized in violation of the seal required by § 3730(b), a *qui tam* defendant may feel compelled to seek a settlement—and even accede to payment of millions of dollars—before the Department of Justice has decided whether a *qui tam* complaint warrants intervention on behalf of the United States. *Qui tam* defendants seek such settlements in order to avoid the risk of incurring False Claims Act liability based on broad theories such as "implied false certification" of material statutory, regulatory, or contractual requirements, *see Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016),

the prospect of treble damages, 31 U.S.C. § 3729(a), and "significant penalties that [are] essentially punitive in nature," *Escobar*, 136 S. Ct. at 1995, 1996 (internal quotation marks omitted), and further reputational harm caused by being held liable "in a fraud action brought in the name of the United States." *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015) (internal quotation marks omitted).

As the 1986 Senate Report explains, the unequivocal statutory mandate to keep the filing of a *qui tam* complaint confidential while the Justice Department reviews a relator's allegations and evidence and decides whether to intervene, "protects both the Government *and the defendant's interests* without harming those of the private relator." 1986 U.S.C.A.A.N. at 5289 (emphasis added). Allowing a *qui tam* suit to proceed despite willful violation of the seal requirement—such as where relators and/or unscrupulous counsel engage in the litigation tactic of deliberately disclosing the filing of a sealed *qui tam* suit in order to "strengthen their own position [by] exposing a defendant to immediate and hostile media coverage"—not only eviscerates the seal provision's force and effect, but also disrupts its underlying "balance [of] competing policy goals." *Summers*, 623 F.3d at 298, 299.

DRI and its members have a strong interest in ensuring that the False Claims Act's *qui tam* provisions operate in the manner that the statute requires and that Congress intended. This includes barring relators and/or their counsel from short-circuiting the judicial process by revealing the filing

or content of a sealed *qui tam* complaint while the Justice Department is investigating the credibility of a relator's allegations and deciding whether intervention on behalf of the United States is warranted.

This Court should hold that *any* intentional violation of the § 3730(b)(2) seal requirement by relators or their counsel requires dismissal of a *qui tam* suit. Anything short of mandatory dismissal for willful breaches is an open invitation to flout the seal requirement, and thereby undermine the entire *qui tam* scheme. As this case illustrates, a subjective "balancing" or "frustration-of-purpose" test can lead to unjust results, even where, as here, the seal violation is deliberate and egregious.

SUMMARY OF ARGUMENT

The False Claims Act's *qui tam* seal requirement—the unequivocal statutory duty to keep a relator's *qui tam* complaint under seal until the Department of Justice completes its investigation of the relator's allegations and decides whether to intervene on behalf of the United States—has been a pillar of the *qui tam* scheme ever since Congress strengthened and modernized the statute thirty years ago.[2] Any intentional violation of the seal

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[2] "In a *qui tam* suit under the FCA, the relator files a complaint under seal and serves the United States with a copy of the complaint and a disclosure of all material evidence." *Carter*, 135 S. Ct. at 1973 (citing 31 U.S.C. § 3730(b)(2)). "After reviewing these materials, the United States may 'proceed with the action, in which case the action shall be conducted by the Government,' or it may 'notify the court that it declines to take over the action, in which case the person bringing the action

requirement by relators, their counsel, or both, should result in mandatory dismissal of the relators' suit. Affording district courts discretion to allow a *qui tam* action to proceed despite deliberate breach of the seal seriously undermines the purposes that the seal requirement serves. Rather than acting as a deterrent against seal violations, a rule that gives district courts latitude to overlook or forgive intentional breaches of the seal would only promote abuse of *qui tam* litigation—litigation that can have profound consequences given the nature of False Claims Act allegations, the financial and reputational harm that *qui tam* suits can inflict, and the fact that *qui tam* actions are literally brought "for" and "in the name of" the United States. 31 U.S.C. § 3730(b)(1).

Violating the seal requirement by making public disclosures in an effort to force a settlement of *qui tam* claims before the Government determines whether intervention is warranted directly affects the interests of *qui tam* defendants, which need to protect against, or at least mitigate, significant harm to their corporate reputations, competitive positions, and finances. Because the Justice Department declines to intervene in a large majority of cases, and non-intervention frequently dooms a relator's action to dismissal or a comparatively low recovery, relators and their counsel need to be deterred from breaching the seal as part of a get-rich-quick litigation strategy for cashing in on unfounded fraud claims. A bright-

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shall have the right to conduct the action.'" *Ibid.* (quoting § 3730(b)(4)).

line rule that intentional seal violations will result in mandatory dismissal provides that deterrent. Dismissal should not be viewed as a penalty for misconduct, but instead, as a way to help ensure that the seal requirement will fulfill its role of facilitating the operation of the *qui tam* scheme, including the Justice Department's essential case-screening role.

ARGUMENT

I. THE SEAL REQUIREMENT ENABLES THE DEPARTMENT OF JUSTICE TO PERFORM AN IMPORTANT CASE-SCREENING FUNCTION

The unremitting onslaught of *qui tam* filings, fueled by the prospect of a statutorily authorized financial bonanza, including when a case is settled prior to trial, underscores the importance of the Justice Department's *in camera* case-screening role. The Government's decision to intervene—or not to intervene—has a "powerful systemic effect: DOJ statistics have long suggested that intervened cases overwhelmingly generate recoveries while declined cases overwhelmingly end in dismissal." David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1712 (2013); *see also id.* at 1720 (indicating that "intervened cases have generated recoveries a whopping 90% of the time, with declined cases failing to achieve recoveries at the same overwhelming rate").

Between 1986 and 2015, settlements and judgments in *qui tam* suits where the Government intervened accounted for 94.5% of total *qui tam*

settlements and judgments, compared to only 6.5% where intervention was declined. DOJ Fraud Statistics Overview, *supra*; *see also* Michael Lockman, Comment, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev 1559, 1564 (2015) (stating "that the recovery rate for declined cases has been steadily falling since the 1990s").

> The immense disparity between recoveries in qui tam actions in which the Government intervened and those in which it did not *suggests that most qui tam actions brought without government intervention assert meritless or frivolous claims.* If this perception reflects reality, then the vast majority of qui tam cases in which the Government declines intervention simply produce unwarranted social costs such as wasting taxpayer dollars by consuming the scarce resources of the courts, delaying meritorious claims, burdening legitimate businesses with defense litigation costs, and causing serious economic and reputational damage to the parties involved.

Sean Elameto, *Guarding the Guardians: Accountability In Qui Tam Litigation Under The Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 826 (2012) (emphasis added); *see also* Engstrom, *supra* at 1694 n.17 (collecting cases suggesting that a Justice Department decision not to intervene in a *qui tam* suit is related to lack of merit); *Summers*, 623 F.3d at 301 (Keith, J., concurring) (the seal requirement

enables the Government to weigh the merits of a *qui tam* claim).

When the seal requirement was added to the False Claims Act in 1986, the Senate Report "noted that the under-seal requirement gave the Government the chance to determine whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene prior to the defendant's learning of the litigation." *Summers*, 623 F.3d at 292 (internal quotation marks omitted); *see* 1986 U.S.C.A.A.N. at 5289 ("Keeping the *qui tam* complaint under seal is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government already is investigating and whether it is in the Government's interest to intervene and take over the civil action."); *see also* Pet. App. 19a ("Congress sought to strike a balance between encouraging private FCA actions and allowing the government an adequate opportunity to evaluate whether to join the suit"); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995) ("The seal provision provides an appropriate balance between these two purposes ").

As a practical matter, the *qui tam* seal provision enables the Department of Justice to fulfill a False Claims Act "gatekeeper" role. *See generally* 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a [False Claims Act] violation . . "); *Summers*, 623 F.3d at 301 (Keith, J., concurring) ("Congress created the filing requirements for the primary purpose of securing for the government the

opportunity to weigh the merits of a private citizen's *qui tam* claim ").

> [U]pon receiving a qui tam complaint, the Department of Justice's investigation usually requires personnel to consult with investigators within the Department and personnel within the federal agency that is the alleged fraud victim. The seal provisions provide time for such consultation so that the United States may make an informed decision about whether to intervene in the qui tam action.

Am. Civil Liberties Union v. Holder, 673 F.3d 245, 250 (4th Cir. 1995)). "Courts routinely grant the DOJ broad extensions of the statutory sixty-day seal period." Lockman, *supra* at 1563. With the benefit of adequate time to investigate relators' allegations, "[t]he DOJ does not intervene in most cases." *Ibid.* In fact, the average yearly intervention rate between 2005 and 2014 was only 23.4 percent. *Id.* at 1563-64.

At the same time, "[t]he potential for astronomical profits, as well as the ever-expanding theories of liability, makes FCA [*qui tam*] actions the fastest-growing area of federal litigation." Elameto, *supra* at 844. Hundreds of new *qui tam* suits are filed every year. *See* DOJ Fraud Statistics Overview, *supra*. The statute awards relators between 15% and 25% "of the proceeds of the action or settlement of the claim" if the United States intervenes, and an even larger amount, between 25% and 30%, if intervention is declined. *See* 31 U.S.C. §§ 3730(d)(1) & (2). Justice Department statistics indicate that between 1987 and 2015, total *qui tam*

judgments *or* settlements exceeded $33 *billion*. DOJ Fraud Statistics Overview, *supra*. On an individual basis, the median relator award as of 2012 averaged $3 million, and ranged from $100,000 to $42 million. Elemato, *supra* at 843. And members of the rapidly expanding "*qui tam* bar" typically can count on banking between 30% and 50% of their relator clients' awards. *Ibid.*

Given the Justice Department's need for adequate time to separate legitimate False Claims Act wheat from opportunistic *qui tam* chaff, coupled with the indisputable impact of the Department's decision on whether to intervene in a *qui tam* suit, the seal requirement should be strictly enforced. Where, as here, relators and/or their counsel breach the seal in the midst of a Justice Department investigation, the relators' suit should be promptly dismissed with prejudice in order to preserve the integrity of the *qui tam* scheme and deter future misconduct on the part of relators and their counsel. Dismissal of the relators' *qui tam* suit for breach of the seal requirement, however, would not prevent the Government from bringing a similar False Claims Act action against the same defendant. *See Summers*, 623 F.3d at 299.

II. THE SEAL REQUIREMENT PROTECTS *QUI TAM* DEFENDANTS' INTERESTS, AS WELL AS THE GOVERNMENT'S INTERESTS

The panel below "embrace[d] the *Lujan* test for addressing violations of § 3730(b)(2)." Pet. App. 20a. When the Ninth Circuit established *Lujan*'s three-factor "balancing" test, it erroneously asserted that "protect[ing] defendants from damaging attacks to

which they are unable to respond" is "not one of the statutory purposes of the seal provision" and "not relevant in determining whether a particular seal violation warrants dismissal." *Lujan*, 67 F.3d at 247. The Ninth Circuit reached this mistaken conclusion by misconstruing a sentence in the Senate Report, which states that "'[b]y providing for sealed complaints, the [Judiciary] Committee does not intend to affect defendants' rights in any way.'" *Ibid.* (quoting 1986 U.S.C.A.A.N. at 5289).[3] The Committee's intent not to affect the rights that the *qui tam* provisions afford to defendants, *see, e.g.*, 31 U.S.C. § 3730(c) ("Rights of the Parties to Qui Tam Actions"), is not the same as an intent to ignore the impact that *qui tam* suits in general, or seal violations in particular, may have on defendants. Indeed, several sentences after the one that *Lujan* misinterprets, the Senate Report states "that sealing the initial private civil false claims complaint protects *both* the Government and *the defendant's interests* without harming those of the private relator." 1986 U.S.C.A.A.N. at 5289 (emphasis added).

The Fourth Circuit correctly recognized that "Congress adopted the 60-day [seal] period for numerous reasons" including "to protect the reputation of a defendant in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene." *Am. Civil Liberties*

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[3] In its certiorari-stage *amicus* brief, the United States committed the same error. *See* Br. for the United States as Amicus Curiae at 12 n.5.

Union v. Holder, 673 F.3d at 249-50; *see also Smith v. Clark/Smoot/Russell*, 796 F.3d at 430 (same); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995) ("Other interests not addressed by this legislative history are also protected. For example, a defendant's reputation "). But even if, contrary to the explicit language of the Senate Report, "harm to the defendant" was not "one of the interests that Congress sought to protect," *Lujan*, 67 F.3d at 247 n.4, the seal requirement "certainly has that *effect*." *Summers*, 623 F.3d at 293 n.4.[4]

A *qui tam* relator's allegations can inflict reputational harm that has serious consequences for a company or other organization that does business with, or seeks payments from, the Government. For example, under the federal procurement system, "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors

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[4] In other *qui tam* litigation, the United States has acknowledged that "[b]eyond serving governmental interests, the sealing requirement protects a defendant's interests as well." Statement of the United States of America In Support of the Defendants' Motion To Dismiss at 5, *United States ex rel. Le Blanc v. ITT Indus, Inc.*, No. 07 Civ. 401 (SHS) (S.D.N.Y. June 20, 2007). The Government recognized that defendants' interests include "'prevent[ing] defendants from having to answer complaints without knowing whether the government or relators would pursue the litigation [and] insulat[ing] a defendant's reputation from meritless suits in which the Government ultimately declines to intervene.'" *Ibid.* (quoting *Pilon*, 60 F.3d at 999). Further, *Lujan* itself acknowledges that "harm to the defendant is an appropriate consideration when the district court dismisses under its inherent powers." 67 F.3d at 247 n.4.

only." 48 C.F.R. § 9.103(a). Further, "[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility." *Id.* § 9.103(b). "To be determined responsible, a prospective contractor must [h]ave a satisfactory record of integrity and business ethics." *Id.* § 9.104-1(d).

Federal contracting officers "determine prospective contractors' responsibility prior to each contract award," and "have substantial discretion" in making such determinations. Kate M. Manuel, Cong. Research Serv., R40633, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures at Summary (2013). False Claims Act allegations are among the "sources of information," 48 C.F.R. § 9.105-1(c), that contracting officers can consider when determining whether a prospective contractor has "a satisfactory record of integrity and business ethics." *Id.* § 9.104-1(d); *see, e.g.*, *In re FCi Fed., Inc.*, B-408558.4 et al., 2014 WL 5374675 (Comp. Gen. Oct. 20, 2014) (contract award protest sustained where contracting officer made favorable contractor responsibility determination without adequately investigating allegations in pending *qui tam* suit); *see also* 48 C.F.R. § 52.209-5 (contracting officer must consider whether a contractor is currently civilly charged by a government entity with fraud when making a responsibility determination). Even worse than being deemed ineligible for receiving a particular contract award, *qui tam* allegations can subject a contractor to suspension from eligibility to receive *any* federal contracts or subcontracts. *See id.* § 9.407-2(a) (federal agency "official may suspend a

contractor suspected, upon adequate evidence of [c]ommission of fraud in connection with performing a public contract or subcontract"). As a result, when a *qui tam* suit or a Government fraud investigation is disclosed, "the public may be concerned about whether the company may be barred from future government contracts, thus impacting stock prices and the ability to obtain contracts with other companies." Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Act*, 38 Seattle U. L. Rev. 901, 935 n.202 (2015).

Along the same lines, the Office of Inspector General of the Department of Health & Human Services may institute an administrative proceeding to exclude from Medicare, Medicaid, and any other federal health care program, any health care provider that has submitted a false or fraudulent claim. *See* 42 U.S.C. § 1320a-7a; 42 C.F.R. § 1001.901(a).

The seal requirement helps to protect an unknowing *qui tam* defendant from reputational and other economic or business-related harm, at least until the Justice Department completes its investigation and decides whether to intervene, and the district court lifts the seal. A willful seal violation, however, can significantly magnify as well as accelerate the reputational and other economic harm that a *qui tam* defendant may suffer before the Justice Department determines whether a suit warrants intervention. As discussed above, the Department declines to intervene in about 75% of *qui tam* suits, and relators historically have been far less successful in non-intervened suits. For these

reasons, the seal requirement precludes relators and their counsel from using premature public disclosure as a tactic for pressuring a defendant into paying millions of dollars to settle False Claims Act allegations that not only are unfounded or at least unproven, but also have not been fully vetted by the Justice Department. Indeed, allowing relators or their counsel to end-run the Justice Department in this manner may raise constitutional concerns by allowing *qui tam* relators and their counsel to seize control of the litigation. *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions*, §4.12[A][1 & 2] (4th ed.) (discussing case law holding that Government control over *qui tam* litigation mitigates separation-of-powers concerns regarding delegation of federal prosecutorial discretion to private persons).

III. WILLFUL VIOLATION OF THE SEAL REQUIREMENT SHOULD RESULT IN DISMISSAL REGARDLESS OF WHETHER THE RELATORS, OR THEIR COUNSEL, OR BOTH, ARE AT FAULT

Like the district court, Pet. App. 68a, the court of appeals drew an artificial distinction between the conduct of the relators' former counsel and the relators themselves. *See* Pet. App. 23a. The district court acknowledged the principle that "a party is responsible for the actions taken by his attorney," but then, contrary to that principle, found that "there is nothing in the record to suggest that the disclosures in question were authorized by or made at the suggestion of the Relators." *Id.* 68a. Similarly, while the court of appeals "assume[d], without deciding, that . disclosures by [relators'] prior counsel . can be imputed to them," and even indicated that

"[w]ere we to impute their former attorneys' disclosures to them we would conclude that [relators] acted in bad faith," the court nonetheless held that "[a]lthough they violated the seal requirement," the relators' "breaches do not merit dismissal." *Id.* at 22a n.9, 23a.

Under this Court's precedents, it is immaterial to dismissal of a *qui tam* suit that the most flagrant seal violations were committed by relators' counsel. "The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988). "Whenever a lawyer makes use of the sword there is some risk that he may wound his own client." *Id.* at 418. As this Court explained in affirming the *sua sponte* dismissal of a damages suit for an attorney's failure to prosecute,

> [t]here is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty of the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent

Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962). Thus, the Court long has recognized the "principle that an attorney's acts are his client's." *Holland v. Florida*, 560 U.S. 631, 664 n.4 (2010) (Scalia, J., dissenting).

The symbiotic relationship between *qui tam* relators and their legal counsel is underscored by the fact that *qui tam* actions are filed both "for the person [i.e., relator] *and* for the United States Government." 31 U.S.C. § 3730(b)(1) (emphasis added). Non-attorneys are generally precluded from representing parties other than themselves—much less the United States—in court. Moreover, there are compelling reasons why a *qui tam* relator should be represented by competent legal counsel, *especially* since the subject matter of *qui tam* suits is so grave, and the procurement, financial, and other interests of the United States are directly at stake. *See* Boese, *supra* at §4.01[B][10] (4th ed. 2016-1 Supp.) (collecting cases and discussing "serious questions about the propriety of pro se *qui tam* suits"); *see, e.g.*, *United States ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003) ("Considering what is at stake for the United States when a relator brings a *qui tam* action, representation by a lay person is inadequate to protect the interest of the United States.").

Because an attorney's conduct is imputed to his or her clients, and *qui tam* relators almost always act (or should act) through legal counsel, a court should not hesitate to dismiss a *qui tam* suit, even if relators' counsel, rather than the relators themselves, has intentionally violated the seal

requirement. Further, mandatory dismissal should not be viewed "as a *sanction* for disclosures in violation of the seal requirement." *Lujan*, 67 F.3d at 245 (emphasis added). Contrary to the views of the United States, the question is not whether "district courts have discretion to fashion appropriate *sanctions* for FCA seal violations." U.S. Br. at 7 (emphasis added).

Rather than viewing the question presented in this appeal in terms of whether or how relators should be sanctioned for seal violations that they and/or their counsel commit, the Court should consider the impact of seal violations on the integrity and operation of the *qui tam* scheme. From that broader perspective, it is difficult to imagine a more devastating way to impair the functioning of the statutory scheme, or to frustrate achievement of Congress's objectives, than to allow relators and their counsel to game the system by leaking information about a sealed *qui tam* suit to the media before the Department of Justice has had an adequate opportunity to evaluate the realtors' allegations and advise the district court whether the Government will intervene. *See Am. Civil Liberties Union v. Holder*, 673 F.3d at 253 ("The United States has a compelling interest in protecting the integrity of ongoing fraud investigations. Congress added the seal provisions in the FCA for numerous reasons, including to preserve the integrity of such fraud investigations.").

"Requiring violations of the FCA's under-seal requirement to be subjected to a balancing test misses the point of the requirement." *Summers*, 623

F.3d at 298. Mandatory dismissal for any deliberate violation of the seal requirement is the only way to deter abuse of the *qui tam* process and ensure that it will function as the statute instructs and Congress intended.

CONCLUSION

The Court should hold that a relator's False Claims Act *qui tam* suit must be dismissed with prejudice where, as here, the § 3730(b)(2) seal requirement has been intentionally violated.

Respectfully submitted,

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